VIRGINIA LAW REGISTER.

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Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at University Station, Charlottesville, Va.; BUSINESS communications to the PUBLISHERS.

WE are indebted to the courtesy of the Judges of the United States Court of Appeals, of this (the Fourth) Circuit, for copies of a number of opinions delivered at the recent term at Richmond. The opinions arrived too late to be noticed in this number.

INCLUDING the cases reported in full and digested in this number, the VIRGINIA LAW REGISTER has published, either in full or in briefer form of head notes, every decision of the Supreme Court of Appeals, directed to be reported, prior to the present session at Wytheville.

M. P. BURKS, State Reporter, advises us that the 95th volume of the Virginia Reports will be in the hands of the binder in a few days, and that the profession may confidently expect the volume to be ready for delivery by September 1, at the latest. The volume will include all unreported cases, to be reported, down to the beginning of the term now in session at Wytheville.

OUR leading article, on the subject of the recent Zola trial at Paris, from the pen of Judge A. M. Keiley, will be read with especial interest by those of our subscribers who were contemporaries of Judge Keiley at the Virginia bar. He has been for some years the American representative on the bench of the International Court at Alexandria, Egypt, in which high place he has reflected honor upon himself and his country. At the time of his appointment, Judge Keiley was a distinguished member of the bar of the city of Richmond.

WE call attention to the case of *Coffman* v. *Castner*, published in full in this issue, involving the right to the exclusive use of the word "Pocahontas" as a trade mark for coal from the famous Pocahontas region. The opinion is a learned one, and the correctness of the de-

cision would seem to be beyond question. We are indebted to S. C. Graham, Esq., of counsel for the appellant, for the preparation of the head-notes.

MESSRS. HURST & CO., of Pulaski, authorize the announcement that their Annotated Pocket Code of Virginia will be ready for delivery during the latter part of the month of August. The plan as set forth in the prospectus is a most excellent one, and the work ought to meet with a cordial reception from the bench and bar of the State. One feature of the book ought to give it a special value, viz., the annotations taken from those made by the late Judge Burks in his own Code. No lawyer in the State was more familiar with the Code and the cases construing it. These annotations and cross references should alone be worth many times the price of the volume.

THE tenth annual meeting of the Virginia Bar Association will be held at Hotel Chamberlin, Fort Monroe, Va., on Tuesday, Wednesday and Thursday, July 5, 6 and 7, 1898. On Tuesday morning the address of the president, Hon. William B. Pettit, of Fluvanna, will be delivered; in the evening of the same day John J. Williams, of Winchester, will read a paper entitled Some "Modern Instances" of a "Wise Saw." On Wednesday morning Beverly T. Crump, of Richmond, will read a paper entitled "The Guardian *ad Litem*." Wednesday evening will be devoted to memorials of deceased members. Hon. George F. Hoar, of Massachusetts, will deliver the Annual Address Thursday morning, and the usual banquet will occur in the evening.

The Virginia lawyer whom one meets at these annual gatherings would be set down as a fine fellow whenever and wherever you meet him. But he is incomparable after three days of eloquence and soft crabs at Old Point, topped off with Chairman Guy's famous Thursday night banquets—

> Where flowing cups run swiftly round
> With no allaying James.

IN the death of R. G. H. Kean, of Lynchburg, on June 13, 1898, Virginia loses one of her first lawyers, and the world one of its best and purest men. He had almost completed his seventieth year, but continued in full practice up to the time of his last illness.

Mr. Kean was a lawyer of unusual ability and accomplishments.

He was a student from his youth, and his professional attainments were of the highest order. He was a strong and successful advocate, and a safe adviser. It is asserted that the late Judge Bond, of the Circuit Court of the United States, before whom Mr. Kean had practised for many years, declared that he was the best lawyer in his circuit, a circuit comprising the States of Maryland, Virginia, West Virginia, North Carolina and South Carolina.

In addition to his eminent professional attainments, Mr. Kean possessed a breadth of general culture rarely found in one who leads the busy life of a practising lawyer. This combined with an attractive personality, rare powers of conversation and a never ending flow of anecdote and reminiscence, made him a marked and favorite figure in whatever company he was found.

The dignity and purity of his character were even more marked than his mental acquirements. His character was modelled after noblest patterns. His conceptions of duty—whether toward his clients, his friends, his profession, his country, his Maker—sprung solely from an enlightened conscience, wherein self-interest or the opinions of others played no part. He literally "stood four square to every wind that blew." He took no chances with right and wrong. To doubt the propriety of any course of action was instantly to avoid it, without hesitation, without reluctance. He profoundly despised pretense or cant in any form, and his withering scorn of unprofessional conduct was a wholesome and inspiring example to his brethren of the bar.

He was dignified and modest by nature. This dignity and reserve were sometimes mistaken for coldness or haughtiness, but his nature was most genial, and his friends knew that his spirit was as warm and sweet as the sunshine itself.

To the younger lawyers, as the writer of this imperfect notice can attest from experience, he was like a father. They were irresistibly drawn toward him, and with them he cultivated the closest relations. No young lawyer but felt that he was honored by Mr. Kean's favorable notice. There was a feeling among his younger friends, shared by many of their elders, that he was too cultivated, too polished, too scrupulously just, for the rough contests of the bar (in which, however, he easily held his own), and that his proper place was on the highest judicial tribunal of the nation.

To know intimately such a man as our departed friend was, to be admitted to the inner sanctuary of his confidence, to study his ideals

and the motives by which he regulated his daily living, could not fail to leave the deepest impression for good upon the most callous nature. In brief, he was one of those rare men whom the world can ill afford to lose, but who leave it better and brighter for having lived in it.

THE Supreme Court of the United States has recently handed down an opinion involving the legality of investments by fiduciaries in Confederate bonds during the civil war. The court had previously held, in at least two cases, that an investment in the bonds of the Confederate government was illegal, since it tended to assist that government in its resistance to the authority of the United States. *Horn* v. *Lockhart*, 17 Wall. 570; *Lamar* v. *Micou*, 112 U. S. 452.

In *Horn* v. *Lockhart* an executor deposited with the Confederate States Depository, Confederate notes which he held as executor, and received a certificate entitling him to Confederate four per cent. bonds to the same amount. This was held to be a direct contribution to the resources of that government, and therefore illegal, and the executor was held not entitled to credit for the amount of such deposit. An additional fact in that case was that the statute authorizing the investment was subsequently held to be contrary to the Constitution of the State of Alabama, under whose laws the executor had qualified.

In the subsequent case of *Lamar* v. *Micou* the fiduciary was a New York guardian, who voluntarily went South after the breaking out of hostilities, and invested the funds of his ward (not consisting of Confederate securities) in bonds of the Confederate government. This was likewise held illegal, since the New York court which appointed the guardian, would not and could not be expected to sanction an investment in the securities of a hostile government.

In the latest case, just decided, *Baldy* v. *Hunter* (May 31, 1898), the facts were somewhat different, though much like those in *Horn* v. *Lockhart*. A guardian, appointed by a court of the State of Georgia, having Confederate notes in his possession belonging to his ward, invested the funds in bonds of the Confederate States, under authority of a Georgia statute. The Supreme Court of Georgia held the investment legal, and allowed the guardian credit for the amount. On appeal, the United States Supreme Court affirms this decision—Mr. Justice Harlan delivering the opinion. The court distinguishes the case from *Lamar* v. *Micou* on the wide difference in the facts as already presented. It also distinguished it from *Horn* v. *Lockhart* on the ground that, by a stipulation of parties, it was agreed that the

investment in the case before it was made "in good faith"— which stipulation the court construed rather liberally as relieving the transaction of any actual intent on the part of the guardian to contribute to the resources of the Confederate government. The Court guardedly adds: "We are unwilling to hold that the mere investment in Confederate bonds—no actual intent to impair the rights of the United States appearing—was illegal as between the guardian and ward." The distinction between this and *Horn* v. *Lockhart* is close, but doubtless justified.

In *King* v. *Mullins* (May 31, 1898) the Supreme Court of the United States, in a learned opinion by Harlan, J., passes upon a question of interest to Virginia lawyers. The case involved the question whether a State may, without inquest or other judicial proceeding, lawfully declare a forfeiture to itself of lands, for failure of the owner to enter them on the tax lists. The constitution of West Virginia, where the case arose, contains a provision declaring such a forfeiture. Virginia has long had a statute to the same effect (now sec. 635 of the Virginia Code), evidently the parent of the West Virginia provision.

The point made by the owner was that such a provision was unconstitutional, as depriving him of his property without due process of law.

There are several Virginia decisions upholding the provision, and declaring that the statute is self-executing, without the necessity for an inquisition or judicial procedure of any kind, all of which cases are reviewed by the court in its opinion. *Staats* v. *Board*, 10 Gratt. 400; *Wild's Lessee* v. *Serpell*, *Id.* 405; *Smith* v. *Chapman*, *Id.* 445; *Usher* v. *Pride*, 15 Gratt. 190; *Smith* v. *Thorp*, 17 Gratt. 221; *Martin* v. *Snowden*, 18 Gratt. 100.

It developed, however, that notwithstanding this clause of the constitution, the statutes of West Virginia provide for a sale of such forfeited lands to be had under a decree of court, in a proceeding to which all claimants are to be made parties, with the right to redeem by payment of taxes due, with the addition of certain penalties.

The court held that, looking at the entire system of taxation, and construing the constitutional and statutory provisions together, the system was, in its essential features, consistent with due process of law. The court declined to pass upon the question whether the constitutional provision for a forfeiture was in itself, standing alone, re-

pugnant to the constitutional guaranty of due process of law. Much of the reasoning of the court would, however, lead to the conclusion that an absolute forfeiture without an opportunity on the part of the owner to be heard in some proceeding, would be unconstitutional. If so, it would seem that sec. 635 of the Virginia Code comes within this condemnation. As far as we know, there is no statute, such as that in West Virginia, giving the owner an opportunity to show cause against the forfeiture; though it is possible that sec. 2339 of the Code may have that effect.

In the case of *Lillibridge* v. *McCann*, recently decided by the Supreme Court of Michigan (75 N. W. 288), it is held that one who negligently sets fire to his own premises is responsible to an adjoining proprietor, to whose property the fire is communicated, as the proximate result of such negligence.

The case is not itself remarkable—the principle being an elementary one. But what strikes us as very remarkable is the comparatively small number of suits of this character to be met with, though the causes of action must be of daily occurrence. Probably the majority of fires thus communicated are due to the negligence of owners or tenants of the buildings in which they originate. And yet it is exceptional to find one neighbor suing another on this account. It would be interesting to consider why railroad companies are shown no mercy, for fire negligently set by their locomotives, while the most litigious land-owner will see his property go up in smoke from a negligent conflagration on adjacent property without once thinking of seeking legal redress. Nevertheless, the two cases are governed by principles identically similar. Doubtless the fact that the offending neighbor has already suffered the loss of his own property in the same conflagration, tends to obscure the legal situation, in the mind of the sufferer, and suggests to him to bear his loss philosophically.

At the original common law, "by the custom of the realm," as it is stated in the books (whatever signification this phrase may have as distinguished from the general law) fire seems to have been regarded as a peculiarly dangerous element, which every man who used it on his premises was bound at his peril to keep safe; and if he allowed it to escape, to the injury of his neighbor, he was liable for the ensuing damage, regardless of any question of negligence. *St. Louis etc. R. Co.* v. *Mathews*, 165 U. S. 1, and cases cited. A parallel is found in the now discredited principle stated in the case of *Rylands* v. *Fletcher*,

Law Rep. 3 H. L. 330, that one who confines a large reservoir of water on his premises, is liable for damage caused by its escape, whether negligent or not. See Bishop's Non-Contract Law, 839, note.

This principle of liability for accidental fires without negligence, was overturned in England by several statutes; Stat. 6 Anne, ch. 31 [58], sec. 7; Stat. 14, Geo. III, ch. 78, sec. 86. The first of these enacted that "no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby, any law or usage or custom to the contrary notwithstanding." By the later statute the exemption was extended to any "person in whose house, chamber, stable, barn or other building, on whose estate any fire shall accidentally begin." This statute was construed in *Filliter* v. *Phippard*, 11 Q. B. 347, as inapplicable to fires intentionally set; and in New York, where the statute seems to be accepted as common law, not to be applicable to fires set by negligence. *Webb* v. *Rome etc. R. Co.* 49 N. Y. 420.

This rule of the common law has not been adopted, as far as we know, in any State of the Union; the rule with us being that the occupant of premises is not responsible for fire escaping therefrom to adjoining premises, unless it be the result of his own wrong—negligent or intentional. See *Catron* v. *Nichols*, 81 Mo. 80 (51 Am. Rep. 222); *Clark* v. *Foot*, 8 Johns. 421; *Bernard* v. *Poor*, 21 Pick. 378; *Hanlon* v. *Ingram*, 3 Iowa 81; *Batchelder* v. *Hegan*, 18 Me. 32; *Tourtellot* v. *Rosebrook*, 11 Metc. 460; *Hoyt* v. *Jeffers*, 30 Mich. 199; Bishop's Non-Contract Law, 833.